In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 695

GEORGE WILLIAM HENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Kentucky of possessing counterfeit money and conspiracy to pass such money. On June 11, 1965, he was sentenced to imprisonment for ten years on the substantive count, with a concurrent five year sentence on the conspiracy count.

The judgment of the court of appeals was entered on August 30, 1966. The petition for a writ of cer-

tiorari, filed October 18, 1966, is out of time under Rule 22-2 of the Rules of this Court notwithstanding the stay of mandate by the court of appeals. *Boylan* v. *United States*, 257 U.S. 614. There is, in any event, no occasion for further review.

The evidence showed that on September 23, 1964, petitioner and co-defendant Wheeler approached David Burton at his automobile wrecking yard in Somerset, Kentucky, and offered to sell $25,000 in counterfeit notes for $11,000 (Tr. 24-30).[1] When Burton agreed to try to find a buyer (Tr. 30) he was given two counterfeit $10 notes to use as samples (Govt. Exh. 1, Tr. 29-30). On September 26, 1964, Burton revealed the scheme and showed the sample notes to the county sheriff (Tr. 33-34). Subsequently petitioner and Wheeler advised Burton that they would be willing to sell $10,000 in counterfeit notes for $4,800, and urged him to find a buyer for that amount (Tr. 34-35). Burton arranged for secret service agent Motto to negotiate a purchase of counterfeit money at a motel near Burton's place of business (Tr. 40, 90, 112). On November 5, 1964, co-defendants Staton and Wheeler drove to the motel. Staton remained in the car, while Wheeler entered Motto's motel room and negotiated with the agent (Tr. 117). When satisfactory terms were reached, Wheeler went back to the car where he spoke to Staton, who then drove off (Tr. 118, 166). Staton returned in ten minutes, and carried to the motel room a package

[1] "Tr." refers to the trial transcript, which has been filed with the Court.

concealed under a coat (Tr. 119). Both Wheeler and Staton were then arrested by other secret service agents who had maintained a surveillance throughout the proceedings (Tr. 123, 167, 208, 223-225, 242). The package contained $19,990 in counterfeit bills, which were identical in design, defects, and serial number to Burton's sample $10 notes (Tr. 169-181).

Prior to the transaction with Motto, on October 7, 1964, petitioner and Wheeler had tried to sell counterfeit notes to one Doyle Couch in Bear Branch, Kentucky (Tr. 267-272). After petitioner and Wheeler drove off, Couch notified the state police (Tr. 274). A state trooper, a few minutes after hearing a dispatch describing petitioner's automobile and the attire of both the driver and passenger, saw the car and pursued it. Petitioner, who was driving, increased his speed, but was apprehended after a four or five mile chase (Tr. 290). No counterfeit money was found in the car or on the persons of either occupant, and the trooper did not see Wheeler throw anything out of the window during the chase (Tr. 297, 299). However, that same day, a truck driver found several bundles of counterfeit $10 and $20 bills on the shoulder of the highway (Tr. 355; Govt. Exhs. 13-16). Some of the $10 notes bore the same serial number as the samples which petitioner had given to Burton. An expert concluded that the money found by the truck driver and Burton's sample notes came from the same source (Tr. 368).

1. Petitioner challenges the rule in the federal courts that testimony of an accomplice is sufficient to support a conviction even if it is not corroborated.

This rule is firmly established, and has withstood countless applications for change. *Holmgren* v. *United States*, 217 U.S. 509; *Caminetti* v. *United States*, 242 U.S. 470, 495; *Krulewitch* v. *United States*, 336 U.S. 440, 454; *United States* v. *Kelly*, 349 F.2d 720, 767 (C.A. 2). The district court advised the jury that if they believed that Burton was an accomplice, "his testimony should be closely examined and weighed with great care." (Tr. 706). Petitioner was entitled to no more than this clearly presented instruction.

2. Petitioner testified on his own behalf that he had never travelled with Wheeler to Burton's wrecking yard, that he did not propose a deal to Burton regarding the sale of counterfeit money, and that he never possessed counterfeit notes (Tr. 425-426). Petitioner claimed that Burton came to his motel room and asked whether petitioner knew where to obtain some counterfeit notes (Tr. 408). Petitioner asserted that he angrily told Burton to leave the room (Tr. 409). In support of his story, petitioner attempted to introduce in evidence two letters mailed to him from Somerset, Kentucky. One envelope was postmarked November 30, 1964; the other, March 1965. The first letter was unsigned, and the other bore the initials "D.B." Both had been written on Burton's business stationery. The letters requested petitioner to send the author money, in exchange for which the author would promise to tell the police authorities that he did not know the petitioner (Pet. 12-13). The trial judge properly refused to admit the letters into evidence without proof that Burton wrote them (Tr. 412). The letters did not qualify as official records

or documents made in the regular course of business. Accordingly, absent proof of the genuiness of the letters or their authorship,[2] they were inadmissible. *Coppedge* v. *United States*, 311 F.2d 128 (C.A.D.C.), certiorari denied, 373 U.S. 946; *Wolcher* v. *United States*, 200 F.2d 493 (C.A. 9); 2 Wharton's *Criminal Evidence*, § 577 (12th ed. 1955).

3. There is no merit to petitioner's contentions regarding the court's handling of the jury. The closing intructions were not confusing, as petitioner claims. Rather, the trial judge clearly spelled out the elements of each offense and the issues which the jury had to decide (Tr. 691-715). At the close of his instructions, the court asked all counsel whether they had any objections or exceptions. Petitioner's sole objection involved an instruction regarding one of the overt acts on the conspiracy count, and the court withdrew that overt act from the jury's consideration (Tr. 716-718).

After the jury had deliberated for almost two hours, it returned this verdict (Tr. 719-720):

> We the jury, find George William Henson guilty Overt Act No. 1, Charles V. Wheeler guilty Overt Act No. 1, 4 and 5, Harold Bruce Staton guilty Overt Act No. 4.
>
> Signed J. S. Helton
> Foreman

The trial judge discussed with counsel the obviously improper form of the verdict, and indicated that he

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[2] On cross-examination, Burton denied having anything to do with the letters, and stated that he was totally illiterate (Tr. 53-56).

would attempt to clarify the situation by issuing further instructions and sending the jury back to deliberate (Tr. 721). None of the defendants raised any objection to the procedure (Tr. 721). After rendering his clarifying instructions, the court again asked whether counsel had any objections or exceptions (Tr. 723):

> MR. NOBLE: The Government has no objections.
>
> JUDGE LEWIS: The defendant Henson has none.
>
> THE COURT: All right, what about the defendant Wheeler?
>
> MR. VIMONT: We have no objection, your Honor.
>
> THE COURT: All right, what about the defendant Staton?
>
> MR. LUNDY: We have none.

The jury deliberated for a half-hour, and returned this verdict (Tr. 725):

> We the jury find George William Henson guilty in Count No. 1 and No. 2; Charles V. Wheeler guilty in Counts No. 1, 2, 3 and 4; Harold Bruch Staton guilty in Count No. 1 and 4.

The court received the verdict without objection from counsel (Tr. 726). The court's procedure in requesting the jury to correct the form of its initial verdict was clearly proper. *Helms* v. *United States*, 310 F.2d 236 (C.A. 5); *Wilder* v. *United States*, 246 F.2d 186 (C.A. 5); see *Bernhardt* v. *United States*, 169 F.2d 983 (C.A. 6), certiorari denied, 335 U.S. 903; *Shiflett* v. *Welch*, 161 F.2d 933 (C.A. 4), certiorari denied, 332 U.S. 777.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1966

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